

DIANE ZARR

v.

ACTING DEPUTY DIRECTOR, OFFICE OF INDIAN EDUCATION PROGRAMS

IBIA 82-51-A

Decided April 21, 1983

Appeal from a decision of the Acting Deputy Director, Office of Indian Education Programs, denying a request for a waiver of an Indian blood quantum requirement for receipt of higher education financial assistance.

Dismissed.

1. Administrative Procedure: Administrative Review--Board of Indian Appeals: Jurisdiction--Indians: Education

Unless or until the Office of Indian Education Programs promulgates regulations providing for administrative review of its decisions, the Office is adhering to the regulations in 25 CFR Part 2. These regulations include an appeal to the Board of Indian Appeals in those cases in which the decision being appealed is based on an interpretation of law.

2. Administrative Procedure: Administrative Review--Board of Indian Appeals: Jurisdiction--Indians: Education

Under 25 CFR 2.19, when a decision in an appeal is not issued by the Director of the Office of Indian Education Programs within 30 days from the expiration of the time for the filing of all pleadings, the Board of Indian Appeals acquires jurisdiction over the appeal.

3. Constitutional Law: Generally--Regulations: Generally

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid or to declare an act of Congress unconstitutional.

4. Rules of Practice: Appeals: Dismissal

An appeal before the Board of Indian Appeals will be dismissed at the request of the parties when it appears that the Board does not have authority to grant the relief sought.

APPEARANCES: Stephen V. Quesenberry, Esq., California Indian Legal Services, Ukiah, California, for appellant; Sandra R. Etheridge, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On August 4, 1982, the Board of Indian Appeals received a letter from Diane Zarr (appellant) seeking review of an appeal filed with the Director of the Office of Indian Education Programs (OIEP), Bureau of Indian Affairs, on

September 1, 1981. In that appeal, appellant sought review by the Director of a decision issued by the Acting Deputy Director, OIEP, which denied appellant's request for a waiver of the one-quarter Indian blood quantum requirement for receipt of higher education financial assistance established in 25 CFR 40.1. Appellant sought review by the Board on the grounds that her appeal had been before the Director for more than 30 days without action, in violation of 25 CFR 2.19.

[1] On August 5, 1982, the Board issued an order making a preliminary determination that it had jurisdiction over this appeal. The Board here affirms that holding. Section 4.330(b)(4) of the Board's regulations in 43 CFR states: "Except as otherwise permitted by the Secretary, the Assistant Secretary for Indian Affairs or the Commissioner of Indian Affairs by special delegation or request, the Board shall not adjudicate: * * * decisions of the Office of Indian Education Programs for which Secretarial review is otherwise provided." To date, regulations otherwise providing for administrative review of decisions of OIEP have not been promulgated. Unless or until such regulations are issued, the OIEP is adhering to the general administrative review procedures established in 25 CFR Part 2. In accordance with those procedures, decisions of the Director, OIEP, that are based upon an interpretation of law are appealable to the Board of Indian Appeals. 25 CFR 2.19(c).

[2] In its order of August 5, 1982, the Board also held that because a decision in appellant's case had not been issued by the Director, OIEP, within 30 days from the expiration of the time for the filing of all pleadings in the appeal, the Board acquired jurisdiction over the appeal under 25 CFR 2.19(b). See Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982).

Although section 2.19 speaks in terms of decisions by the Commissioner of Indian Affairs, since OIEP is utilizing the review procedures in 25 CFR Part 2, the Director, OIEP, is likewise responsible for issuing decisions on appeals within 30 days, or transmitting the appeal to the Board.

On April 18, 1983, following the submission of opening briefs by both appellant and appellee, the Board received a joint motion to dismiss this appeal on the grounds that the Board was without jurisdiction to grant the relief sought by appellant. The motion states that appellant seeks to invalidate the Indian blood quantum requirement of 25 CFR 40.1 as being in excess of statutory authority or, alternatively, to have the statute upon which the requirement is based declared unconstitutional as a violation of equal protection.

[3, 4] The Board agrees that it does not have authority to declare duly promulgated Departmental regulations invalid, Connovichnah v. Acting Anadarko Area Director, 9 IBIA 179, 89 I.D. 71 (1982), or to declare an act of Congress unconstitutional, Estate of Caye, 9 IBIA 196 (1892); Estate of Stowhy, 1 IBIA 269, 79 I.D. 428 (1972). Because it appears that this is the only relief sought by appellant, and because the Board is without jurisdiction to grant this relief, the appeal will be dismissed. Cf. Lord v. Commissioner of Indian Affairs, 11 IBIA 51 (1983).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed.

Jerry Muskrat
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge